

83 - 1269

CASE NO. _____

Office - Supreme Court, U.S.
FILED
JAN 23 1984
ALEXANDER L STEVENS
CLERK

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

IN RE: JOSE M. FERNANDEZ, CARLOS
LAHERA, RAFAEL ENRIQUE FRANJUL
AND LAZARA RODRIGUEZ

Petitioners

ON EMERGENCY PETITION FOR WRIT OF
MANDAMUS TO THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

PETITION

BIERMAN, SONNETT, BEILEY,
SHOHAT & SALE, P.A.
EDWARD R. SHOHAT, ESQUIRE
200 S.E. First Street, #500
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and

JOHN LAZARUS, ESQUIRE
9300 S.W. 61 Court
Miami, Florida 33156

Attorneys for Petitioner

QUESTIONS PRESENTED

Does the United States Court of Appeals for the Eleventh Circuit violate Rule 9 of the Federal Rules of Appellate Procedure when it accepts jurisdiction over a government appeal of an order imposing conditions of pre-trial release and then imposes a briefing and oral argument schedule which sets oral argument for a time approximately two months after the filing by the government of a notice of appeal, during which time the Petitioners remain incarcerated?

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF MANDAMUS	1
APPENDIX	A1

TABLE OF AUTHORITIES

	<u>PAGE</u>
Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187 (1965).....	8
Atkins v. Michigan, 644 F.2d 543 (6th Cir. 1981).....	9
Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976)..	9
18 U.S.C. §3146.....	2, 4, 5
18 U.S.C. §3147.....	4, 5
28 U.S.C. §1651.....	1
Federal Rules of Appellate Procedure Rule 9.....	6

PETITION FOR WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioners, JOSE M. FERNANDEZ,
CARLOS LAHERA, RAFAEL ENRIQUE FRANJUL and
LAZARA RODRIGUEZ, respectfully request this
Honorable Court to issue its most gracious
writ of mandamus and state:

1. This is an action pursuant to
Title 28 U.S.C. §1651, the All Writs Act.

2. Petitioners are Defendants in
Case No. 83-993-Cr-ALH in the United States
District Court, Southern District of Florida.

3. Respondents are the United
States Court of Appeals for the Eleventh
Circuit and Judges James C. Hill, Albert J.
Henderson, Jr. and Frank M. Johnson of that
Court making up the panel in Case No. 83-
5839.

4. Petitioners were arrested and
have been incarcerated since November 20,
1983.

5. Following their arrests, Petitioners invoked their right to bail under the Eighth Amendment to the United States Constitution and sought proceedings pursuant to 18 U.S.C. §3146, the Bail Reform Act. On December 21, 1983, a hearing was conducted before the Honorable Alcee Hastings, United States District Judge, regarding Petitioners' bail status.

6. On December 22, 1983, Judge Hastings entered an Order reducing bond for the Petitioners LAHARA and RODRIGUEZ and initially setting bond for the Petitioners FERNANDEZ and FRANJUL.

7. On December 27, 1983, the United States of America (hereinafter the "government") filed a Notice of Appeal of the District Court Order. A copy of the government's Notice of Appeal is attached hereto as Exhibit "A".

8. The government also requested

the Court of Appeals to enter an emergency stay of Judge Hastings' bail Order. On December 28, 1983, the Respondent Eleventh Circuit Court of Appeals granted an indefinite stay of the District Court's Order for all Petitioners without either a hearing or argument and granted the government's motion to expedite the appeal. A copy of the Respondent's Order is attached hereto as Exhibit "B".

9. On December 29, 1983, the Respondent Court of Appeals set a briefing schedule allowing twenty days for appellant's and appellees' briefs and seven days for appellant's reply brief. The Court scheduled oral argument for the week of February 27, 1984. A copy of the Court's procedural Order is attached hereto as Exhibit "C".

10. On January 3, 1984, Petitioner, CARLOS LAHARA, filed his cross-appeal of the District Court's Order pursuant

to 18 U.S.C. §3147. LAHARA's cross-appeal challenges the District Court's determination of the amount of his bond. A copy of the Petitioner LAHARA's Notice of Appeal is attached hereto as Exhibit "D". On December 29, 1983, Petitioners filed motions to dismiss the government's appeal and a motion to dissolve the stay entered by the Respondent contending that the Respondent lacks jurisdiction over an appeal by the government from an order setting conditions of release pursuant to 18 U.S.C. §3146. This jurisdictional question is one of the main issues on the appeal.

11. On January 5, 1984, Petitioners filed an Emergency Motion For Ruling on their Motion to Dismiss and Motion to Dissolve Stay and a Motion to Accelerate Consideration of the Appeal. A copy of these motions is attached hereto and incorporated herein as Exhibit "E".

12. On January 9, 1984, Petitioners Motion to Dismiss and Motion to Dissolve Stay were denied by the Respondent Court of Appeals without having either received a response from the government or heard oral argument. No formal ruling was had with respect to the Petitioners' Motion to Accelerate the Appeal. However, on January 18, 1984, Petitioners received formal notification from the Court of Appeals that oral argument is scheduled for Monday, February 27, 1984.

13. The current hearing and determination schedule established by the Respondent Court of Appeals violates Petitioners' fundamental right to bail under the Eighth Amendment to the United States Constitution and 18 U.S.C. §3146. Were this an appeal by the Petitioners from a pre-trial order setting bail pursuant to 18 U.S.C. §3147(b) - the only appeal authorized by law

from a pre-trial order setting bail - that Section requires that "the appeal shall be determined promptly."

14. The present briefing and argument schedule established by the Respondent Court of Appeals is in direct violation of Rule 9 of the Federal Rules of Appellate Procedure, which provides:

Rule 9. Release in Criminal Cases.

(a) Appeals from orders respecting release entered prior to judgment of conviction. An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the District Court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the records as the parties shall present. The Court of Appeals or a judge thereof may order the release of the appellant pending the

appeal.

Although Petitioners have argued below that the language of Rule 9 is evidence of the fact that the government may not appeal a pre-trial order setting bail, it is clear that if such an appeal exists it must be determined "promptly" without the delays attendant to the preparation and filing of briefs and other papers. Petitioners advise this Court that the government's preliminary appellate papers included a complete record of the proceedings in the District Court; the Court of Appeals has before it at this time all papers necessary on which to decide the appeal.

15. The Petitioners have no adequate remedy at law nor in any other court to require the Respondent Court of Appeals to establish a prompt hearing and determination date on the government's appeal. The Respondent Court of Appeals has heretofore

rejected all requests for a prompt ruling on the bond question.

16. Petitioners are suffering irreparable injury as they remain preventatively detained after a District Court judge has determined the appropriate amount of bail to assure their reasonable appearance. Petitioners will have no redress for the time that they have been incarcerated if, after a hearing, they are released on bond. Moreover, the day on which oral argument has been scheduled by the Respondent Court of Appeals is subsequent to the scheduled trial date, thereby effectively rendering moot Petitioners' constitutional right to pre-trial bail.

17. This Court has consistently held "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545,

552, 85 S.Ct. 1187, 1191 (1965); Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 902 (1976).

18. In Atkins v. Michigan, 644 F.2d 543, 550 (6th Cir. 1981), the Sixth Circuit stated, "[t]he due process questions ... exist here only in connection with the right to bail pending trial - a right that must be defended immediately if it is to be protected at all."

19. Your Petitioners herein seek only a prompt hearing as required by the same law available to them if they had been the appealing parties. To accomplish this purpose, Petitioners respectfully request that this Court immediately, and without requiring a response from the government or the Respondent, order the Respondent, United States Court of Appeals, to schedule an immediate hearing on and to determine the government's appeal in Case No. 83-5834.

Respectfully submitted,

BIERMAN, SONNETT, BEILEY,
SHOHAT & SALE, P.A.
EDWARD R. SHOHAT, ESQUIRE
200 S.E. First Street
Suite 500
Miami, Florida 33131
(305) 358-7477
and
JOHN LAZARUS, ESQUIRE
9300 S.W. 61 Court
Miami, Florida 33156

Attorneys for Petitioners

By: EDWARD R. SHOHAT
EDWARD R. SHOHAT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of January, 1984, to JON MAY, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida, 33130-1693, and to all counsel of record.

By: EDWARD R. SHOHAT
EDWARD R. SHOHAT

A P P E N D I X

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 83-993-Cr-ALH

UNITED STATES OF AMERICA

v.

JOSE MANUEL FERNANDEZ-TOLEDO,
a/k/a Jose M. Fernandez,
a/k/a Cheo Fernandez,
LAZARA ESTHER RODRIGUEZ-SENSAT,
a/k/a Lazara Rodriguez,
a/k/a Linda,
CARLOS SANTIAGO LAHERA-GONZALEZ,
a/k/a Carlos Lahera,
RAFAEL ENRIQUE FRANJUL,
a/k/a Frank Sinatra,
a/k/a Frankie

NOTICE OF APPEAL

Notice is hereby given that the
United States of America, pursuant to Title
28,, United States Code, Section 1291, and
Title 18, United States Code, Section 3731,
appeals to the United States Court of Appeals
for the Eleventh Circuit from the Order of
the Honorable Alcee L. Hastings, United
States District Judge for the Southern

District of Florida; entered in the above-styled cause on December 22, 1983, setting bond as to defendants Fernandez and Franjul and reducing bond as to defendants Lahera and Rodriguez.

Respectfully submitted,

STANLEY MARCUS
UNITED STATES ATTORNEY

BY:

JON MAY
Assistant United States Attorney
155 South Miami Avenue
Miami, Florida 33130-1693
Telephone: (305) 350-5414

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal was this 27th of December, 1983, mailed to: FEDERICO A. MORENO, ESQ., 19 West Flagler Street, Suite 714, Miami, Florida 33130; EDWARD R. SHOHAT, ESQ., 200 S.E. First Street, #500, Miami, Florida 33131; JOHN LAZARUS, ESQ. 9300 S.W. 61st Court, Miami, Florida 33156; and OSCAR RODRIGUEZ, ESQ., 300

Seville, Suite 313, Coral Gables, Florida

33134.

JON MAY

Assistant United States Attorney

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-5834

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JOSE MANUEL FERNANDEZ-TOLEDO,
ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District
Court for the Southern District of Florida

Before HILL, JOHNSON and HENDERSON, Circuit
Judges.

B Y T H E C O U R T:

IT IS ORDERED that appellant's
emergency motion for stay is granted.

IT IS FURTHER ORDERED that
appellant's motion to expedite the appeal is
granted.

EXHIBIT "C"

UNITED STATES COURT OF APPEALS
Eleventh Circuit

December 29, 1983

TO ALL COUNSEL OF RECORD LISTED BELOW

Re: 83-5834 U.S.A. v. JOSE MANUEL
FERNANDEZ-TOLEDO, LAZARA ESTHER
RODRIGUEZ-SENSAT, CARLOS SANTIAGO
LAHERA-GONZALEZ, & RAFAEL ENRIQUE
FRANJUL

Dear Counsel:

Enclosed is a copy of this Court's order granting the government's motion to stay and expedite the appeal.

In light of the court having expedited this appeal, the following briefing schedule should be strictly adhered to:

Appellant's brief is due for filing within 20 days from the date of this letter or no later than January 18, 1984;

Appellees' briefs are due for filing within 20 days from service of appellant's brief.

Any reply brief by the appellant should be filed within seven (7) days from service of appellees' briefs.

This case will be argued in Miami,

Florida, during the week of February 27, 1984. You will receive the exact date of oral argument at a later date.

By copy of this letter to the clerk, Southern District of Florida, and the court reporter, we are requesting the record on appeal be filed expeditiously.

Sincerely,

SPENCER D. MERCER, CLERK

By: _____

Warren A. Godfrey, Chief
Judicial Support Division

WAG/sh

Enclosure

Linda Collins Hertz, AUSA-Miami

John May, AUSA-Miami

Federico A. Moreno

Edward R. Shohat

John Lazarus

Oscar Rodriguez

Robert March, Clerk, SFL

Helen Norton-Powell

EXHIBIT "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 83-993-Cr-ALH

UNITED STATES OF AMERICA

v.

CARLOS SANTIAGO LAHERA-GONZALEZ

NOTICE OF APPEAL FROM CONDITIONS OF RELEASE

Notice is hereby given that

Defendant, Carlos Lahera, pursuant to Title 18 U.S.C. Section 3147(b), appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the Honorable Alcee L. Hastings, United States District Judge for the Southern District of Florida, entered in the above-styled cause on December 22, 1983, as to the amount of bond

set for Defendant Lahera.

Respectfully submitted,

JOHN D. LAZARUS
Attorney for Carlos Lahera
9300 S. W. 61st Court
Miami, FL 33156
(305) 667-7192

EXHIBIT "E"

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO.: 83-5834

UNITED STATES OF AMERICA, :
:
Appellant/Plaintiff, :
:
v. :
:
JOSE MANUEL FERNANDEZ-TOLEDO, :
et al., :
:
Appellees/Defendants. :
:

EMERGENCY MOTION: (1) FOR RULING ON
MOTION TO DISMISS AND MOTION TO DISSOLVE
STAY; AND (2) TO ACCELERATE CONSIDERATION
OF APPEAL

The Defendant/Appellee, JOSE MANUEL
FERNANDEZ-TOLEDO, (hereinafter "Defendant"),
by and through his undersigned counsel,
respectfully moves this Honorable Court: (1)
to rule on his previously filed Motion to
Dismiss Appeal and Motion to Dissolve Stay;
and (2) to accelerate consideration of
appeal. In support of this motion, the
Defendant would show:

1. This case is an appeal by the United States of America (hereinafter "government") from an Order of the Honorable Alcee L. Hastings, United States District Judge, dated December 22, 1983, setting conditions of pre-trial release pursuant to Title 18 U.S.C. §3146. The government's Notice of Appeal was filed on December 27, 1983.

2. Prior to filing its Notice of Appeal, the government, on December 23, 1983, prefilled an Emergency Motion for Stay and Motion to Expedite the Appeal together with a package of nine (9) exhibits.

3. On December 28, 1983, one day after the government filed its Notice of Appeal, this Court granted the government's Emergency Motion for Stay and Motion to Expedite the Appeal.

4. On December 29, 1983, the Defendant filed his Memorandum of Points and

Authorities in Reply to Emergency Motion for Stay and Motion to Dismiss the Appeal as well as a Motion to Dissolve the Stay and for Immediate Release During the Pendency of the Appeal.

5. That same day the Court, by letter, established a briefing and oral argument schedule by which this case will not be ripe for determination until after oral argument which is scheduled for the week of February 27, 1984.

6. The trial of this case is currently scheduled to commence on February 1, 1984. Therefore, the briefing and oral argument schedule, as currently set, could result in a de facto reversal of the District Court having the practical effect of keeping the Defendant in custody during all of the pre-trial period in this case.

7. The current briefing and oral argument schedule constitutes a denial of the

Defendant's right to bail under the Eighth Amendment to the United States Constitution and under the Bail Reform Act, Title 18 U.S.C. §3146.

8. The present briefing and oral argument schedule is unnecessary to a proper determination of this appeal. The issues have been thoroughly briefed by the parties in the form of the government's Emergency Motion for Stay and the Defendant's response thereto. The nine (9) exhibits submitted by the government along with its Emergency Motion for Stay make up the entire relevant record below. The government's exhibits include transcripts of all the proceedings except the proceeding before Judge Hastings which consisted purely of the argument of counsel. Although he had the record of all proceedings before the Magistrate before him, no testimony was taken before Judge Hastings.

9. This Court considered and

granted the government's Motion for Stay of the Defendant's release in one day without so much as a hearing or an opportunity for Defendant to respond. On the other hand, neither the Defendant's Motion to Dismiss nor his Motion to Dissolve Stay have been ruled upon to the knowledge of counsel. This situation is manifestly unfair especially in light of the fact that the central issue in this case is the Defendant's right to bail.

WHEREFORE, the Defendant, JOSE MANUEL FERNANDEZ-TOLEDO, respectfully prays this Honorable Court to immediately rule upon his Motions to Dismiss and Motion to Dissolve Stay and otherwise to advance the oral argument date in this case to the next next available date and thereafter to make an immediate determination on the merits of this

appeal.

Respectfully submitted,

BIERMAN, SONNETT, BEILEY,
SHOHAT & SALE, P.A.
Attorneys for Appellee
200 S.E. First Street, #500
Miami, Florida 33131

BY

EDWARD R. SHOHAT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by _____ this _____ day of January 1984 to JOHN MAY, ESQ., Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130-1693 and to all counsel of record.

BY

EDWARD R. SHOHAT